Nos. 247 and 319

In the Supreme Court of the United States

OCTOBER TERM, 1967

THE PUYALLUP TRIBE, PETITIONER

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, ET AL.

NUGENT KAUTZ, ET AL., PETITIONERS

v.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

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290-507—68

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The principal question presented in these cases is to what extent, if any, a State is free to regulate off-reservation fishing by Indians who have been guaranteed by federal treaty the "right of taking fish, at all usual and accustomed grounds and stations, * * * in

common with all citizens of the Territory." [1] The issue is raised here as between the State of Washington and the Puyallup and Nisqually Indians, both tribes claiming under Article III of the Treaty of Medicine Creek of March 3, 1855 (10 Stat. 1132). The same question, however, arises with respect to a dozen other Indian Tribes in several States under substantially identical provisions of other treaties.[2] Although the problem is not new and has produced substantial litigation in the lower courts, both State and federal, it has never been definitely resolved by this Court. There are, to be sure, sometimes inconsistent *dicta* on the subject in opinions rendered here, to which we advert; but, essentially, we urge the Court to look at the question afresh, re-interpreting the original understanding in light of contemporary realities.

I

The initial question is whether the treaty stipulation just quoted does more than merely assure the Indians the *same* right to fish as others enjoy at the

[1] For the purposes of this case, we assume the correctness of the State court's conclusion in No. 247 that the fishing grounds at issue are not within the present boundaries of the Puyallup Reservation. The only question of recurring importance—which arises at all events in No. 319—is that stated in the text.

[2] See Treaty of Point Elliot (12 Stat. 927), Art. V (Suquamish, Swinamish, Lummi and others); Treaty of Point no Point (12 Stat. 933), Art. IV (Skokomish); Treaty with the Makah (12 Stat. 939), Art. IV; Treaty of Walla-Walla (12 Stat. 945), Art. I (Umatilla); Treaty with the Yakama (12 Stat. 951), Art. III; Treaty with the Nez Perce (12 Stat. 957), Art. III; Treaty of Wasco (12 Stat. 963), Art. I (Warm Springs); Treaty with the Quinaielt (12 Stat. 971), Art. III; Treaty with the Flatheads (12 Stat. 975), Art. III.

specified locations. If so, their fishing may of course be restricted, or even prohibited, by general regulations which validly apply also to everyone else. The argument for that result would focus on the fact that no exclusive right is granted, but, rather, a mere right to fish "in common with all citizens of the Territory." And it would be stressed, also, that the fishing sites involved are outside the reservation, at places otherwise fully subject to State jurisdiction. See *Kennedy* v. *Beeker,* 241 U.S. 556, 564. In our view, however, that contention cannot stand.

Indeed, if the only guarantee to the Indians was freedom from discrimination in their fishing at the specified locations, the treaty has no effect today, since Indians, as citizens subject to State jurisdiction when off their reservation, are presumably entitled to equal protection anyway. Yet, as this Court has said of the contention that "the Indians acquired no rights * * * but such as they would have without the treaty," "[t]his is certainly an impotent outcome to negotiations and a convention, which seemed to promise more, and give the word of the Nation for more." *United States* v. *Winans,* 198 U.S. 371, 380. Moreover, if mere equality of rights was granted, why is it that the Indians, unlike other citizens, retain a privilege of access to the fishing grounds after the adjacent lands have passed into private ownership, as this Court has held? See *United States* v. *Winans, supra; Seufert* v. *United States,* 249 U.S. 194. And why do the Indians alone enjoy an immunity from taxation in exercising their right to fish? *Tulee* v. *Washington,* 315 U.S. 681.

The answer is that the Indians, by virtue of the treaty, enjoy a federal *right* to take fish at particular locations, whereas others do not. In part, this is a property right which carries with it an easement over the adjacent land, although privately owned, to gain access to a fishing site. That, however, is a rather secondary aspect of the grant. The right runs also against the State, qualifying the new sovereign's otherwise absolute dominion over the wildlife of the territory and the consequent power to regulate, or even, prohibit, the taking of fish. See *Geer* v. *Connecticut,* 161 U.S. 519; *Lacoste* v. *Dept. of Conservation,* 263 U.S. 545, 549. The exemption from taxation in the exercise of the treaty right (*Tulee, supra*) is an illustration of this principle, being an immunity which even the fee owner of the riparian property does not enjoy as a matter of right because his fishing is a mere privilege that may be granted or withheld by the State, and therefore licensed on any reasonable conditions. But the tax exemption does not exhaust the treaty guarantee. The same reasons must also give some exemption from *regulation*; the "right" would not deserve the name if it could be destroyed or abridged by prohibitions and restrictions.

To hold otherwise would not carry out the terms of the treaty "in accordance with the meaning they were understood to have by the tribal representatives" who ceded the tribal lands on the condition that their fishing rights would be preserved (*Tulee, supra,* 315 U.S. at 684). For it is well known that, to all these tribes of the Pacific Northwest, fishing was "not much less necessary to the existence of the Indians than the

atmosphere they breathed" (*Winans, supra,* 198 U.S. at 381). And see No. 247, A. 11, 26. To be sure, "it is idle to suppose that there was any actual anticipation at the time the treaty was made" that the State would find it necessary to restrict fishing (*Kennedy* v. *Becker, supra,* 241 U.S. at 563). But it does not follow—at least where no State sovereignty yet existed [3]—that the failure expressly to foreclose State regulations should expose the right to destruction or serious dilution. On the contrary, one supposes that, if modern conservation laws had been foreseen, at least a partial exemption would have been written into the treaty for the benefits of the Indians whose way of life was so bound up with fishing. That fact should be given some effect if we are to construe the treaty guarantee "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people" (*Tulee, supra,* 315 U.S. at 684–685).

There can be no question as to the propriety of recognizing a limited exemption from State regulation for Indians in whom the United States confirmed a right to continue fishing at "usual and accustomed grounds and stations." There is no reason why the

[3] In *Kennedy* v. *Becker*, the transfer of lands from the Seneca Tribe to Robert Morris, with a reservation of fishing rights, was made with the knowledge that the area would come under the jurisdiction of the State of New York, and the Court reasoned that "the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not." 241 U.S. at 563. That case is also distinguishable from ours in that the United States was not the transferee and was not the guarantor of the continuing fishing rights of the Indians.

tribes, in ceding a portion of their lands, could not reserve fishing rights without reserving the fee. Indeed, as we have seen, this Court has held that they did reserve a perpetual easement over the adjoining property (*Winans* and *Seufert, supra*). So, also, merely because they abandoned tribal sovereignty over these areas for other purposes, they were not required to subject themselves to foreign regulations affecting their fishing at specified locations. Cf. 18 U.S.C. 1162(b).

Nor must the exemption have terminated when the United States relinquished its jurisdiction to the State. Just as Indian reservations survived statehood without becoming subject to State laws (*Winters* v. *United States,* 207 U.S. 564), fishing rights could be immunized from local regulations after the area involved was transferred to State jurisdiction. As this Court observed in *Winans, supra,* 198 U.S. at 384, "surely it was within the competence of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish' at all usual and accustomed places." And, here—unlike other grants (*e.g. Ward* v. *Race Horse,* 163 U.S. 504)—it is clear the guarantee was meant to be permanent, surviving statehood and the issuance of patents: "the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees," *Winans, supra,* 198 U.S. at 381–382. See also, *Tulee, supra,* 315 U.S. at 684.

II

What has been said thus far might lead to the conclusion that Indians whose fishing rights have been

confirmed by treaty are absolutely immune from outside regulation and may fish at any time, in any manner without limit. That was, inded, the Court's apparent assumption in *Ward* v. *Race Horse,* 163 U.S. at 514, where it was observed that, while, normally, the States are empowered "to regulate the killing of game within their borders," nevertheless, "if the treaty applies * * * that State would be bereft of such power." Yet, *dicta* in *Winans, supra,* 198 U.S. at 384, *Tulee, supra,* 315 U.S. at 684, and *Village of Kake* v. *Egan,* 369 U.S. 60, 75, might be read as indicating that the exercise of these treaty rights is fully subject to "restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish" (*Tulee, supra*). We suggest a middle course.

The difficulty with either extreme is easily demonstrated. If the treaty rights of the Indians are so paramount as to be wholly beyond any regulation, then, hypothetically, the Indians are free to destroy the fishery by excessive fishing. Not only would that be a harsh result, but it seems inconsistent with the non-exclusive character of the right guaranteed. Having agreed to share their fisheries "in common with all citizens of the Territory," the Indians cannot be permitted in effect to exclude all others by appropriating to themselves the entire resource. On the other hand, the special right of the Indians would have no substantial recognition if the State were permitted to prohibit or very severely limit their fishing, merely because such regulations were necessary as to other fishermen in the interest of conservation. There is no question of equal

treatment here: unlike ordinary citizens who fish only as, if and when the State allows it, the Indians retain a portion of their ancient rights, prior in time and once exclusive, recognized and confirmed by the superior authority of the United States. Indian fishing pursuant to a treaty can be limited, but only so far as is necessary to preserve the resource; it cannot be restricted simply to achieve uniformity or to allay the jealousy of the non-Indian fisherman whose activities the State is free to curb. In sum, there must be an accommodation of federal treaty rights and State conservation policy which does not wholly sacrifice either interest.

Though these broad guidelines do not immediately resolve concrete cases, they do indicate a direction. This would require rejection of both the absolute immunity for treaty fishing recognized by the Idaho Supreme Court (see *State* v. *Arthur,* 74 Idaho 251, 261 P. 2d 135) and the view apparently held by the court below that Indians must be subjected to whatever general regulations are shown to be necessary for conservation—whether or not special exemptions or adjustments can be made for Indian fishing without endangering the resource. In our view, the Court of Appeals for the Ninth Circuit has outlined the correct approach in *Makah Indian Tribe* v. *Schoettler,* 192 F. 2d 224, and *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation,* 314 F. 2d 169, by declining to sustain the State's claim of power indiscriminately to apply general fishing restrictions to Indians exercising treaty rights in circumstances where it was apparent that the ends of conservation

could be fulfilled by exempting the relatively insignificant tribal fishing or devising less restrictive rules for them and imposing more severe limitations on others.[4]

Of course, each situation requires a particularized assessment. But the goal, in our view, should be to allow the Indians the widest possible measure of freedom in exercising their historic rights, when-

[4] In *Confederated Tribes of the Umatilla Indian Reservation* v. *Maison*, 186 F. Supp. 519, affirmed 314 F. 2d 169, the State of Oregon contended that it had the right to preclude all fishing on the Columbia and Snake Rivers during the spawning season notwithstanding the fact that these tributaries were the ordinary and accustomed grounds of the Indians. The court rejected the State's contention because it found the number of fish taken by the Indians was but a small percentage of the total and that the same conservation purpose could be served by restricting fishing at other areas through which the fish passed on the way to those tributaries, or by limiting the fishing by sports fishermen who had taken over 4,600 breeder fish which had actually arrived at the tributaries.

In *Makah Indian Tribe* v. *Schoettler*, 192 F. 2d 224, a State conservation law prohibited any fishing in the Hoko River except by pole and line. The court held that this law could not be applied to the Indians because there was a more reasonable method of conservation available—a partial stopping of fishing during the fish run. The court ruled that the fact that this method of conservation might be more expensive for the State to police could not justify depriving the Indians of their treaty-secured right to fish in the Hoko River.

Another example is provided by *Confederated Tribes of the Umatilla* v. *Maison*, 262 F. Supp. 871, in which the Oregon Game Commission sought to sustain its right to enforce against the Indians laws restricting the right to hunt for deer and elk. The evidence showed that the Indians killed 300–350 deer and 150–175 elk per year, while sportsmen killed 9,055 elk and 24,222 deer per year, and that the supply of elk and deer had been increasing. The court ruled that in these circumstances the State law could not be applied to the Indians.

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CARD 12

ever conservation can be achieved by reasonable restrictions imposed elsewhere. No doubt, the need for making such accommodations is burdensome for the States involved. But the rights of the Indians should not be sacrificed unless something more than convenience is involved. See *Tulee, supra,* 315 U.S. at 685. Moreover, the Secretary of the Interior, by recent regulations, has undertaken to assume a large part of the burden. Thus, it is contemplated that the Secretary, in cooperation with the relevant State authorities and the tribal government, will promulgate appropriate restrictions on off-reservation fishing by Indians and will furnish identification to those entitled to exercise treaty rights. See 25 C.F.R., Part 256.[5] Once the basic standards are announced by this Court, it should not be difficult for State, federal and tribal authorities to reach workable arrangements which fairly accommodate the competing rights and interests.

III

Turning to the cases before the Court, we conclude that the judgments below must be reversed. Indeed, although it set aside the trial court's injunction against the Puyallup Indians (No. 247, A. 53–54) and modified that entered against the Nisqually Indians (No. 319, A. 16), the Washington Supreme Court gave no practical recognition to the tribal rights guaranteed by the Treaty of Medicine Creek. Because federal treaty rights were involved, the court did insist

[5] The general regulations, to be followed by particularized area regulations, are printed in the Appendix to the initial Memorandum filed by the United States in these cases, pp. 10–17.

that the State establish that the restrictions applied to the Indians are "reasonable and necessary for the preservation of the fishery" (No. 247, A. 55). But there is really no dispute on this point: if the initial premise is that other rules are to remain as they are and the question is whether the existing restrictions on fishing in Commencement Bay and in the Puyallup and Nisqually Rivers need be applied to *all* fishermen in those areas or *none*, the answer is doubtless that conservation demands it.[6] The court's error, in our view, was in declining to consider whether, consistent with the overall goal of conservation, it was not possible to provide an exemption, or at least some relaxation of existing regulations, for Indians exercising their treaty rights.

We need not suggest precisely the accommodation that might be made. We point out, however, that apparently undisputed facts of record in No. 247 reveal quite clearly that a total prohibition of net fishing by the Puyallups at their "usual and accustomed grounds" is not necessary to preserve the fishery. Thus, we are told that the Indians are responsible for only 3% to 5% of the total catch and that the use of nets is permitted for some 99% of the annual fish run outside the areas where treaty rights apply. On the face of these statistics, it would seem feasible to make some adjustment in favor of Indian fishing by slightly

[6] That is apparently the conclusion reached on remand by the State trial court in the *Puyallup case*. See No. 247, A. 69. See, also, Judge Hunter's dissent below which argues, correctly in our view, that the remand ordered by the majority of the Washington Supreme Court is meaningless (No. 247, A. 65–66).

curbing commercial fishing in Puget Sound (see No. 247, A. 178–179). At least, we submit the State should have been required to show the impracticability of some such adjustment before being permitted to outlaw all net fishing by the Indians in the Puyallup River.

In No. 319 the record is too bare to permit any concrete suggestion as to methods of accommodation. The matter is not foreclosed, however, by the stipulation that Indian fishing by present methods "[i]f permitted to continue * * * would virtually exterminate the salmon and steelhead fish runs of the Nisqually River" (No. 319, A. 6, 8, 9). For, again, that may be true today only because excessive fishing downstream by others severely reduces the breeding stock that reaches the "usual and accustomed grounds" of the Tribe. And, at all events, if some limitation on Indian fishing is necessary, perhaps at certain periods of the year, it may be that measures short of an absolute prohibition on netting will accomplish the purpose if other fishing is more severely restricted.

Respectfully submitted.

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